

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/328/99/NJ

In the complaint between:

Moses Mlungisi

Complainant

and

Anglo American Property Services Provident Fund

Respondent

PRELIMINARY DETERMINATION IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956 (“**the Act**”). The complaint relates the payment of a death benefit in terms of section 37C of the Act, in particular, the enforcement of a decision by the respondent involving the distribution of the death benefit.
2. No hearing was held in this matter. An investigation was conducted by my investigator, Naleen Jeram. Accordingly, in handing down this ruling, I have relied on the documentary evidence and written submission gathered during the course of Mr Jeram’s investigation. For reasons which appear below, I have chosen to hand down a preliminary ruling.
3. The complainant is Moses Mlungisi, and adult male of Durban, KwaZulu Natal. The complaint was lodged with my office on 5 August 1999, at which point the complainant was still a minor. Therefore, the complainant was assisted by his mother and guardian, Mrs H J Dlamini, who lodged the complaint on behalf of her son. During our investigation the complainant attained majority. However, he was continued to be

represented by his mother.

4. The respondent is Anglo America Property Services Provident Fund, a pension fund duly registered under the Act and falling within the definition of pension fund organization contained in section 1 of the said Act (“**the provident fund**”). The provident fund is represented by Ms Carol Winskill of the Human Resources Administration Department of Ambros (Pty) Ltd, a participating employer in the provident fund.
5. Mr Mandla Stancelos Dlamini was employed by Anglo American Property Services and at the same time was also a member of the provident fund. On 25 March 1996 Mr Dlamini passed away. A death benefit of R96,871.66 (after deductions for tax and a home loan) became available for distribution. The trustees of the provident fund effected the following distribution in terms of section 37C of the Act (for the purposes of this determination it is unnecessary to consider the factual considerations considered by the trustees in determining the circle of beneficiaries and making an equitable distribution):

<u>Beneficiaries</u>	<u>Entitlement</u>	<u>Amount</u>
H J Dlamini (wife)	30%	R28,161.54
Lindiwe B (daughter)	10%	R 9,687.17
Makhosazane T (daughter)	10%	R 9,687.17
Thobile H (daughter)	10%	R 9,687.17
Moses Mlungisi (son)	20%	R19,374.33
Xolisile F (daughter)	10%	R 9,687.17
Lungile (daughter)	10%	R 9,686.17

6. In about September 1996 Mrs H J Dlamini’s benefit was paid into her bank account. Individual trusts were created for the deceased’s five daughters and minor son into which the respective benefits were to be paid. However, the broker who arranged for

the establishment of the trusts, in error ensured that each child received the same amount. Therefore, six trusts were established and an amount of R10,951.69 was paid into the respective trusts. This error was never rectified by the provident fund.

7. To date the status of the relevant trusts are as follows:

<u>Beneficiaries</u>	<u>Date</u>	<u>Withdrawals</u>	<u>Status</u>
Lindiwe	30.01.1997	R10,361.70	Trust fund closed
Makhosazana	30.01.1997	R 920.00	
	13.10.1997	R 7,919.90	
	11.11.1997	R 1,590.00	Trust fund closed
Thobile H	11.04.1997	R 1,590.00	
	23.01.1998	R 1,840.00	
	16.03.1998	R 630.00	
	21.09.1998	R 6,456.48	Trust fund closed
Moses M	07.1999	R 6,000.00	
	07.07.2000	R 4,820.21	Trust fund closed
Lungile	14.10.1999	R 2,500.00	
	Balance	R 8,494.07	
Xolisile	18.01.2000	R 3,500.00	
	27.01.2000	R 3,500.00	
	Balance	R 4,041.60	

8. The complainant is dissatisfied with the fact that only R10,951.69 (as opposed to R19,374.33) was paid into the trust set up for himself. He seeks an order directing the fund to pay him the amount as initially agreed by the trustees, but not implemented.

9. Ms Winskill acting on behalf of the provident fund conceded that the trustees decided

to award the complainant 20% of the death benefit (R19,374.33) and that an error was made in that all six children received R10,951.68. From the response it is also evident that no steps were taken to reconcile the error. Furthermore, other than stating that the broker made an error, no reasons were advanced as to why the trustees decision could not be implemented.

10. In determining this complaint, it must be stressed that the complainant is not challenging the decision by the trustees of the provident fund to award him 20% of the death benefit. Rather, he seeks enforcement of a decision by the respondent fund to award him 20% of the benefit. The provident fund made a lawful distribution in terms of section 37C of the Act, in terms of which Mrs Dlamini was entitled to 30% of the death benefit, the complainant 20% and the remaining daughters were each entitled to 10%. The fact that each child, including the complainant received R10,951.68 meant that they each received 11.6% of the death benefit. In terms of the decision made by the trustees of the provident fund, the additional 1.6% of the benefit awarded to each of the daughters and the consequent decline in the complainant's benefit by 8.4% is unlawful. From the evidence before me, there is no reason in fact, law or otherwise why the complainant is not entitled to the additional 8.4% of his awarded benefit (representing R8,422.65) plus interest thereon.

11. However, I believe it would be unwise to make a final order in this matter for the following reasons. No hearing was held. The five daughters of the deceased, who all have a substantial interest in this matter have not been cited as parties to these proceedings. In the interest of procedural fairness, no final order can be made without the said daughters being afforded an opportunity to forward submissions and arguments.

12. In the interest of procedural fairness I consider it necessary to join, Ms B Lindiwe, Ms T Makhosazane, Ms H Thobile, Ms F Xolisile and Ms Lungile as second to sixth respondents respectively and to issue a rule *nisi* affording the parties an opportunity to

make further submissions.

13. The preliminary ruling of this tribunal is as follows:

13.1. Ms B Lindiwe, Ms T Makhosazane, Ms H Thobile, Ms F Xolisile and Ms Lungile are joined as the second to sixth respondents respectively to the complaint in terms of section 30G(d) of the Act.

13.2. The respondent is directed to serve a copy of the complaint, its response and this ruling upon the second to sixth respondents within 7 days of this ruling.

13.3. A rule *nisi* is hereby issued, in terms of which all parties are called upon to show cause, if any, within 21 days of this ruling why the following order should not be granted:

13.3.1. The respondent provident fund is directed to pay the complainant R8,422.64 together with interest thereon compounded at the rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 16 September 1996 to the date of payment, within 6 weeks of the date of this ruling.

Dated at **CAPE TOWN** this 9th day of October 2000.

JOHN MURPHY

Pension Funds Adjudicator